

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 10, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2014AP2124
2016AP1953**

**Cir. Ct. Nos. 2013CV2195
2014CV2186**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

OTTER CREEK FARMS, LLC AND GARY W. THOMPSON,

PLAINTIFFS-APPELLANTS,

V.

WAUKESHA COUNTY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
LEE S. DREYFUS, JR., Judge. *Affirmed.*

APPEAL from an order of the circuit court for Waukesha County:
PATRICK C. HAUGHNEY, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. This case involves WIS. STAT. § 88.87 (2015-16),¹ which addresses a property owner’s right to sue a governmental entity for flooding or water damage due to allegedly faulty roadway construction or maintenance. Otter Creek Farms, LLC and its owner, Gary W. Thompson (collectively, Thompson), appeal from a 2014 order dismissing Thompson’s case against Waukesha County and from a 2016 order granting summary judgment in favor of the County.² Thompson alleged that a decades-old reconstruction of a county road (Lannon Road) without adequate ditches or culverts has resulted in significant flooding of his property. The circuit courts concluded that Thompson’s actions against the County are time-barred under § 88.87(2)(c). As § 88.87 is the exclusive procedure for pursuing such actions and Thompson’s suits did not meet the statutory requirements, we affirm the orders.

¶2 Sometime in the 1970s, the County reconstructed portions of Lannon Road, raising the roadbed. In December 2003, Thompson purchased land bordering Lannon Road. Thompson walked the land before purchasing it and saw that soybeans had died off in certain spots despite an overall robust crop. In 2004, he noted ponding in low spots after heavy rains and, “no later than [in] the Spring

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless noted.

² The Honorable Lee S. Dreyfus presided over Waukesha County circuit court case no. 2013CV2195; the Honorable Patrick C. Haughney presided over Waukesha County circuit court case no. 2014CV2186. This court has consolidated the appeals for briefing and disposition.

of 2005,” that there was no culvert under the portion of the road adjacent to his property.

¶3 The County is responsible for the maintenance of Lannon Road. In April 2008, Thompson informed the County highway commissioner that a “few acres” of his crops die off each year after “substantial rains,” as “[i]t appears that as the highway is maintained, there is no provision for the water to escape along the natural drainage path.” Thompson asked to meet “to discuss how this water impoundment problem can be resolved.” The letter made no mention of potential legal action. After inspecting the property, the County declined to take action, concluding that water pooled in a natural depression on the property and that installing a culvert would only divert the water onto neighbors’ properties.

¶4 In December 2012, Thompson sent a letter to the County public works department, followed by a complaint and petition alleging a violation of WIS. STAT. § 88.87(2) and maintenance of a private nuisance. He requested a writ of mandamus directing the County to install a culvert and/or maintain its ditches as well as injunctive and other equitable relief. The circuit court granted the County’s motion to dismiss because Thompson’s unsworn letter was filed more than three years after he became aware of the ponding issue. *See* § 88.87(2)(c).

¶5 Thompson filed a second notice of claim in June 2014, this one a sworn statement, and a new lawsuit in October 2014.³ In addition to the claims made in the first action, he alleged an easement violation and trespass. He asked the County to maintain the ditches and install a culvert and requested monetary

³ In September 2014, Thompson filed a notice of appeal from the order dismissing his 2013 case. This court ordered that that appeal be stayed pending resolution of the second action.

damages, including punitive damages. The circuit court dismissed the case on summary judgment, since Thompson’s notice of claim was outside both the three-year window of WIS. STAT. § 88.87(2)(c) and the 120-day time frame of WIS. STAT. § 893.80, the general notice-of-claim statute, and because § 88.87 governs to the exclusion of any other common law remedies.⁴ To the extent the unpled constitutional claims Thompson raised at summary judgment amounted to a motion to amend the pleadings, the court denied the motion. After a failed motion for reconsideration, Thompson filed this second appeal.

¶6 The circuit court dismissed Thompson’s 2013 lawsuit. A motion to dismiss presents a question of law that we decide de novo. *Kohlbeck v. Reliance Constr. Co., Inc.*, 2002 WI App 142, ¶9, 256 Wis. 2d 235, 647 N.W.2d 277. We accept as true all facts as pleaded by the plaintiff. *Id.* “Plaintiffs must allege facts that plausibly suggest they are entitled to relief.” *Data Key Partners v. Permira Advisors LLC*, 2014 WI 86, ¶31, 356 Wis. 2d 665, 849 N.W.2d 693.

¶7 The parties debate whether Lannon Road’s reconstruction comports with the clear legislative intent that county roads be constructed and maintained so as to preserve, as far as is practicable, original drainage flow lines and thereby avoid flooding or water-soaking lowlands due to an unreasonable accumulation and discharge of surface waters. *See* WIS. STAT. § 88.87(2)(a). Thompson points to a 2015 survey he commissioned that indicates that Lannon Road blocks natural drainage patterns. The County argues that it has no liability because, as

⁴ We do not address the conclusion that Thompson’s notice of claim also was time-barred under WIS. STAT. § 893.80. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if one issue dispositive, no need to address others).

constructed, the road does not impede the general flow of surface water “in any unreasonable manner,” and ditches and culverts are not required if not feasible under “sound engineering practices.” Sec. 88.87(2).

¶8 Under the facts here, the merits of both positions are neither here nor there. Thompson noticed ponding in 2004 and realized in either 2004 or 2005 that there was no culvert. He did not file a formal notice of claim until 2012, seven or eight years later. WISCONSIN STAT. § 88.87(2)(c) provides the exclusive remedy for damage due to flooding associated with road construction or maintenance. As is relevant here, the statute requires that a written claim be filed with the County “within 3 years after the alleged damage occurred” and must contain a sworn statement of the purported faulty construction and a legal description of the involved property. *Id.*

¶9 Thompson asserts that the time limitation does not apply to claims for equitable relief, however, as the three-year notice provision in WIS. STAT. § 88.87(2)(c) refers only to “damages.” He suggests that we should overrule *Pruim v. Town of Ashford*, 168 Wis. 2d 114, 483 N.W.2d 242 (Ct. App. 1992), and *Van v. Town of Manitowoc Rapids*, 150 Wis. 2d 929, 442 N.W.2d 557 (Ct. App. 1989), which hold to the contrary. See *Pruim*, 168 Wis. 2d at 119; *Van*, 150 Wis. 2d at 934. Even were he correct, and we do not hold that he is, we are bound by our precedent. See *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (court of appeals may not overrule, modify, or withdraw language from a prior published opinion).

¶10 Next, Thompson would have us construe his 2008 letter to the highway commissioner as proper notice. Accepting that he discovered the lack of a culvert in 2005 such that the letter fell within the three-year time frame, this

argument still fails. It contained neither a sworn statement of the alleged faulty road construction nor the property's legal description, it was not served on the chairperson of the county board or the county clerk, *see* WIS. STAT. § 801.11(4)(a)1., and it gave no intimation that a claim for damages might follow. WISCONSIN STAT. § 88.87(2) is unambiguous. *Pruim*, 168 Wis. 2d at 119. These procedures are a mandatory condition precedent to filing a claim under the statute. *Van*, 150 Wis. 2d at 931.

¶11 Nor does the County's visit to his property to follow up on the letter amount to "actual notice of the claim." *See* WIS. STAT. § 88.87(2)(d). "The purpose of the notice of claim is to afford the governmental entity an opportunity to effect compromise without suit ... and to budget for settlement or litigation." *Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 593, 530 N.W.2d 16 (Ct. App. 1995) (citations omitted). Thompson's 2008 letter requesting a meeting did not put the County on notice that he later would initiate legal action or seek damages. Thompson himself states that he decided to drop the matter in 2008 in reliance on the County's representation that a culvert was not an option, and he did nothing for four more years.

¶12 Thompson also submits that flooding in his basement in 2008, due to a separate but adjacent watershed, "reset" the time period for filing a claim, thus making the 2008 "notice-of-claim letter" timely. His wife testified in her deposition, however, that the basement flooding was a one-time event occurring in 2004. Whosever recollection is correct, we already have explained why the 2008 letter does not suffice as a proper notice of claim.

¶13 Thompson next contends the circuit court wrongly granted the County's motion for summary judgment in response to his 2014 notice of claim

and lawsuit. We review de novo a motion for summary judgment, using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987). We first examine the pleadings to determine whether a claim for relief has been stated, taking as true all facts pleaded by the plaintiff and all inferences that reasonably can be derived from them. *Id.* Summary judgment is proper if there is no dispute of material fact and the undisputed facts require judgment for a party as a matter of law. WIS. STAT. § 802.08(2).

¶14 Thompson argues that several disputes of fact should have defeated the County’s motion: whether it was 2004 or 2005 when he first knew there was no culvert; whether the basement flooded in 2004 or 2008; whether installing a culvert is a viable solution; and whether areas of his land are naturally low-lying or became that way from the long-ago road reconstruction.

¶15 These disputes are not material. Thompson knew by 2008 at the latest that there was no culvert, that the basement flooded, that the County said installing a culvert was unfeasible, and that the County believed areas of his land were naturally low. The first valid notice of claim was not filed until June 2014. It simply was not timely. The court properly granted summary judgment.

¶16 The circuit court also properly dismissed Thompson’s common-law claims. The legislative purpose of WIS. STAT. § 88.87 is “to regulate and control strictly the types of claims that may be made by property owners against governmental entities regarding highway construction and repair.” *Pruim*, 168 Wis. 2d at 122. “Common law nuisance actions are not allowed. The statute clearly and unambiguously forbids it.” *Id.* “Section 88.87 limits the type of relief available to those that are stated in the statute.” *Kohlbeck*, 256 Wis. 2d 235, ¶7.

We agree with the circuit court that, while *Pruim* involved only nuisance, the reasoning is equally applicable to other common-law claims such as Thompson’s claims for trespass and an easement violation.

¶17 In his brief opposing the County’s summary judgment motion, Thompson raised new theories for his claims, including Fourteenth Amendment equal protection; Fifth Amendment governmental taking; a new trespass claim stemming from the County’s November 2015 erection of a snow fence on his property⁵; statutory nuisance and easement-interference claims; and violation of a local drainage ordinance. He did not file a formal motion to amend the pleadings. The County objected. The court treated Thompson’s effort as a request to amend the pleadings and denied the “motion.”

¶18 We apply an erroneous-exercise-of-discretion standard of review to a ruling on a motion to amend the pleadings. *Schultz v. Trascher*, 2002 WI App 4, ¶14, 249 Wis. 2d 722, 640 N.W.2d 130. We will not reverse a discretionary decision unless the circuit court misuses its discretion by failing to exercise it, makes a decision unsupported by the facts, or applies the wrong legal standard. *Finley v. Culligan*, 201 Wis. 2d 611, 626-27, 548 N.W.2d 854 (Ct. App. 1996).

¶19 Leave to amend the pleadings shall be “freely given at any stage of the action when justice so requires.” WIS. STAT. § 802.09(1). Here, the court considered that fifteen months had elapsed since the filing of the original complaint, and that the proposed amendment would add “an entire separate claim that would ... serve to invalidate portions (or at least certain interpretations)” of

⁵ Thompson since has filed a new notice of claim regarding the snow fence. He alleges he did not consent to its placement and the captured snow contributes to excess surface water.

WIS. STAT. § 88.87, require extensive briefing, significantly delay the proceedings, and force the County to “have to begin defending a fundamentally different case at this late stage of the proceedings.” *See Mach v. Allison*, 2003 WI App 11, ¶27, 259 Wis. 2d 686, 656 N.W.2d 766 (listing factors to consider in determining whether to permit amendment even after summary judgment granted). The court amply supported its conclusion that justice did not require granting leave to amend the pleadings. We see no erroneous exercise of discretion.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

